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In The

Supreme Court of the United States

October Term, 1995

LUIS GUILLEN-GARCIA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals violated the First Amendment by ordering a legal resident alien deported, despite his request for relief under § 212(c) of the Immigration and Nationality Act, solely because he held a belief that he did not commit the crimes of which he had already been tried, convicted, and fully punished.

2. Whether the court of appeals erred in affirming the Board's order where (a) the Board improperly applied a *per se* rule that an alien's failure to confess negated all evidence of his rehabilitation *and* all other "outstanding equities" in his favor; and (b) the Board failed to provide, even after two attempts, any reasoned explanation for its decision, thereby frustrating effective judicial review.

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PETITION FOR A WRIT OF CERTIORARI

Luis Guillen-Garcia petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 17, 1995, and its subsequent denial of a petition for rehearing on August 16, 1995.

OPINIONS BELOW

On March 9, 1987, Immigration Judge Dennis R. Kramer orally granted Mr. Guillen's petition for relief from deportation under § 212(c) of the Immigration and Nationality Act (the "Act"). (App. 48.) The Board of Immigration Appeals (the "Board") reversed this decision on August 13, 1992. (App. 35.) The Board's decision was reversed and remanded by the court of appeals on July 2, 1993, in a decision reported at 999 F.2d 199 (7th Cir. 1992) ("*Guillen I*"). (App. 21.)

After remand, on June 17, 1994, the Board issued another opinion upholding its previous decision. (App. 16.) The court of appeals affirmed that ruling on July 17, 1995, in a decision reported at 60 F.3d 340 (7th Cir. 1995) ("*Guillen II*"). (App. 1.) On August 16, 1995, the court of appeals denied a timely petition for rehearing with suggestion for rehearing en banc. (App. 56.)

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was

entered on July 17, 1995. The court of appeals denied a timely petition for rehearing on August 16, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), provides:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

Section 241(a)(4) of the Act, 8 U.S.C. § 1251(a)(2)(A)(ii) (formerly 8 U.S.C. § 1251(a)(4)), provides in pertinent part:

> Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens:
>
> * * *
>
> Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not

arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

STATEMENT OF THE CASE

Luis Guillen-Garcia is 43 years old. He was born in Mexico but has resided in the United States for the last 29 years as a lawful permanent resident. He is married to a United States citizen and has five children, from six to 21 years old, all of whom are United States citizens.

In 1974, when he was 22 years old, Mr. Guillen was convicted of aggravated battery and sentenced to five years' probation. In 1982 he was convicted of attempted murder and sentenced to ten years' imprisonment; after serving four and a half years, he was released for good behavior and was discharged from supervision in 1989.

In 1984 the Immigration and Naturalization Service ("INS") issued an Order to Show Cause charging Mr. Guillen with deportability under § 241(a)(4) of the Act as an alien convicted of two or more crimes involving "moral turpitude." Mr. Guillen conceded deportability but applied for discretionary relief under § 212(c) of the Act.[1]

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[1] Section 212(c) provides that aliens in lawful permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful, unrelinquished domicile of seven consecutive years, may be admitted in the Attorney General's discretion without regard to certain enumerated grounds for exclusion. Section

Mr. Guillen asserted that he was entitled to relief because "outstanding equities" in his case outweighed the grounds for his deportation. Those equities included his rehabilitation since 1982, his strong family ties in this country, his efforts to educate himself (earning diplomas in welding and auto mechanics), his consistent employment history, and the extreme hardships that would befall him and his family should he be deported.

After hearing testimony on February 11 and March 9, 1987, Immigration Judge Dennis R. Kramer granted Mr. Guillen's request for relief. The judge found "outstanding equities" in Mr. Guillen's favor. He had lawfully entered the United States "at a very young age" and had "exceptional family ties" here. (App. 50, 54.) The testimony of his wife, children, parents, and siblings established his family ties and the "extreme hardship" that deportation would impose on both Mr. Guillen and his family. (App. 52-53.) The judge specifically noted the emotional and financial hardships that deportation would have on Mr. Guillen's wife and children. (App. 53.)

The judge also found that Mr. Guillen was fully rehabilitated even though he continued to believe that he was innocent of the two crimes of which he had been convicted. (*Id.*) The judge found Mr. Guillen to be "very sincere." (App. 54.) Subsequent to his two convictions, there was no evidence that Mr. Guillen had violated the

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212(c) also applies to lawful permanent residents facing deportation who have not gone abroad but meet the seven-year residence requirement. *See Cortes-Castillo v. INS*, 997 F.2d 1199, 1202 (7th Cir. 1993); *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976). The Attorney General's discretion has been delegated to the Board.

law, carried weapons, or engaged in violence. (App. 53.) The judge concluded that Mr. Guillen can be "a productive member of our society and should be allowed to remain in this country." (App. 54.)

On August 13, 1992, the Board reversed this decision and ordered Mr. Guillen deported. (App. 47.) The Board conceded that Mr. Guillen had demonstrated "outstanding equities." (App. 44.) Nevertheless, the Board held that all of the evidence demonstrating Mr. Guillen's rehabilitation was negated by his continued belief in his innocence. (App. 45.) On this basis alone, the Board denied relief under § 212(c).

Mr. Guillen sought review in the United States Court of Appeals for the Seventh Circuit pursuant to 8 U.S.C. § 1105a. On July 2, 1993, the court of appeals reversed and remanded the Board's decision, finding that the Board had improperly "relied exclusively on Mr. Guillen's refusal to acknowledge guilt regarding his convictions." *Guillen I*, 999 F.2d at 205. (App. 33-34.) The court of appeals held that the Board had failed to consider "all the circumstances surrounding Mr. Guillen's efforts to demonstrate rehabilitation." The court instructed the Board to assess rehabilitation "on the basis of all relevant evidence, not merely [Mr. Guillen's] refusal to admit guilt." *Id.* (App. 34.)

After remand, on June 17, 1994, the Board again denied relief and ordered Mr. Guillen deported. (App. 20.) In a brief opinion the Board stated that "we do not apply a per se rule that a failure to admit guilt with respect to the convictions forming the basis of the deportation proceedings negates a finding [of rehabilitation]."

(App. 18.) However, the Board then found that Mr. Guillen's "denials [of culpability] undermine the evidence of reformation proffered by him." (*Id.*) In the absence of rehabilitation, the Board found that the seriousness of Mr. Guillen's crimes, which he refused to confess, nullified all other "outstanding equities." (App. 19.)

Mr. Guillen again sought review pursuant to 8 U.S.C. § 1105a. On July 17, 1995, the court of appeals affirmed the Board's decision. The court noted that a heightened degree of scrutiny should be applied after an agency has been explicitly instructed to explain its decision on remand and then "arrives at substantially the same conclusion." *Guillen II*, 60 F.3d at 344 & n.5 (quoting *Greyhound Corp. v. ICC*, 668 F.2d 1354, 1358 (D.C. Cir. 1981)). (App. 10 & n.5.) However, the court concluded that the Board's decision "was not arbitrary or capricious" because its second opinion "indicated that it considered Mr. Guillen's evidence of rehabilitation," and the Board "was not required to discuss that evidence at length." 60 F.3d at 345. (App. 12.) On August 16, 1995, the court denied a timely petition for rehearing with suggestion for rehearing en banc. (App. 56.)

REASONS FOR GRANTING THE PETITION

Summary

The government may not punish people for their beliefs, and it may not try to induce them to change or disown their beliefs. The First Amendment prohibits "governmental programs of thought control, however

such programs might be justified in terms of permissible state objectives." *United States v. Reidel*, 402 U.S. 351, 359 (1971) (Harlan, J., concurring). That principle has been violated here. The Board ordered Mr. Guillen deported solely because he held a belief in his innocence.

Mr. Guillen has been fully punished for his crimes. He has had an unbroken record of exemplary behavior since 1982. Now, however, simply because Mr. Guillen continues to believe in his innocence – and would not make an expedient "confession" – he, and his family, are to be punished again.

The Board cited Mr. Guillen's belief as a token of something else – his lack of rehabilitation. But all other evidence established that for many years Mr. Guillen had been a devoted supporter of his family, industrious, law-abiding, and religiously devout. The only countervailing "evidence" cited by the Board was Mr. Guillen's refusal to confess and the seriousness of the crimes of which he had been convicted. However, the seriousness of these crimes is presumed and not in dispute; indeed, it was only because of their seriousness that the deportation proceeding was initiated. The Board cannot use this presumed seriousness to penalize Mr. Guillen's belief. If Mr. Guillen sincerely believes that he was innocent of these crimes, their seriousness is not a reason for him to make an insincere confession. There is no evidence that Mr. Guillen's belief was insincere.

That Mr. Guillen's belief was irrelevant to his rehabilitation is confirmed by the Board's inability, on two separate occasions, to explain how his belief nullified the

favorable evidence concerning his actions and inclinations since 1982. The Board's inability to connect Mr. Guillen's belief to any relevant aspect of his conduct or character shows that the Board decided to deport Mr. Guillen solely because of his belief, not because his belief demonstrated insincerity, dishonesty, or a likelihood of future wrongdoing. The Board's decision was an arbitrary exercise of discretion based on an unauthorized and unexplained presumption. This violates not only the First Amendment but also the terms of § 212(c) and the requirements of judicial review.

Deportation may not be based on a person's beliefs even though the decision is discretionary. There are legitimate and illegitimate grounds for the exercise of discretion. If the government is allowed to deport Mr. Guillen solely because he continues to believe in his innocence, there is nothing to stop it from deporting others because of their avowed beliefs that the legal system is imperfect, or that immigration policies are unjust; the government could even use religious beliefs as a basis for deportation. Our Constitution and laws prohibit such attempts to police the thoughts of citizens and legal resident aliens alike.

I. THE BOARD VIOLATED PETITIONER'S FIRST AMENDMENT RIGHTS BY ORDERING HIM DEPORTED SOLELY BECAUSE HE HOLDS A BELIEF

Beliefs unrelated to conduct are absolutely protected by the First Amendment. "[A]t the heart of the First Amendment is the notion that an individual should be

free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977).

Under the First Amendment, the government may not punish beliefs or force people to disavow their beliefs. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). In ordering Mr. Guillen deported, the Board punished him for continuing to believe in his innocence. Even after two attempts, the Board remained unable to connect that belief to any legitimate concern about Mr. Guillen's conduct or inclinations.

The First Amendment extends its protections to legal resident aliens as fully as to citizens. *Bridges v. Wixon*, 326 U.S. 135, 148 (1945); *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501, 506 (9th Cir. 1992). "[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment." *Bridges*, 326 U.S. at 161 (Murphy, J., concurring).

This Court has prohibited the use of a defendant's beliefs as a basis for additional punishment in criminal cases. *Dawson v. Delaware*, 503 U.S. 159 (1992). *See also United States v. Lemon*, 723 F.2d 922, 937 (D.C. Cir. 1983) ("A court may not punish an individual by imposing a heavier sentence for the exercise of first amendment

rights"). The same principles properly apply to deportation proceedings as well. *See Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977) ("Deportation is a sanction which in severity surpasses all but the most Draconian criminal penalties"). *See also Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation may result in "loss of both property and life, or of all that makes life worth living"); *Bridges*, 326 U.S. at 164 (Murphy, J., concurring) ("The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence").

Mr. Guillen had a constitutional right to plead innocent in his criminal proceedings. *Brady v. United States*, 397 U.S. 742 (1970). He may not be penalized for the exercise of that right. *See* Fed. Sent. Guidelines § 3C1.1, Application Note 1 (the sentencing enhancement for obstruction of justice "is not intended to punish a defendant for the exercise of a constitutional right. A defendant's . . . refusal to admit guilt . . . is not a basis for application of this provision"). He also has the First Amendment right to maintain his innocence. Penalizing him for exercising that right is all the more repugnant when he has already been fully punished for his crimes.

Even a convicted defendant may have legitimate reasons for continuing to believe in his innocence. *Cf. United States v. Dunnigan*, 113 S. Ct. 1111, 1117 (1993) (a defendant may wrongly, but honestly, believe that he did not commit a crime because of "confusion, mistake or faulty memory"). Our system of justice does not require a defendant to forswear his own belief and denounce himself after he has been convicted, sentenced, and fully punished. The government certainly may not impose *new*

punishment or any other disability, such as deportation, because he refuses to do so.

A person's image of himself, within his own mind, is his last and most private refuge. The government may not enter there and require him to change – or to misrepresent – the self-image he holds dear. "[T]he assertion that the state has the right to control the moral content of a person's thoughts. . . . is wholly inconsistent with the philosophy of the First Amendment." *Stanley*, 394 U.S. at 565-66.

II. RATHER THAN WEIGHING THE EVIDENCE AS REQUIRED BY THE STATUTE, THE BOARD IMPROPERLY APPLIED A PER SE PRESUMPTION, AND IT FAILED TO PROVIDE A SUFFICIENT EXPLANATION OF ITS DECISION

In addition to its constitutional infirmity, the Board's decision suffers from two other defects. First, the Board improperly replaced the careful weighing of the evidence required by § 212(c) with a *per se* presumption that a failure to confess to serious crimes automatically nullifies all countervailing evidence of rehabilitation and other "outstanding equities." Second, the Board failed to explain its reasons sufficiently for effective judicial review. The latter defect confirms the former; the lack of an explanation reveals the Board's improper reliance on presumptions instead of analysis. Either of these defects required reversal of the Board's decision.

A. The Board Substituted Presumptions For The Required Weighing Of All Relevant Factors

Section 212(c) requires the Board to weigh all aspects of an alien's conduct and circumstances. *See, e.g., Matter of Marin*, 16 I & N Dec. 581, 584 (BIA 1978). The Board has no authority to narrow the scope of the statute or to set up rigid litmus tests for the granting of relief. Yet that is what the Board did here. In effect, the Board established a *per se* rule: Mr. Guillen's refusal to change his mind and confess guilt automatically disqualified him from relief. All other facts and circumstances became irrelevant, even though the Board itself conceded that the record demonstrated "outstanding equities" in his favor. It is hard to imagine what more Mr. Guillen could have accomplished over the preceding decade to satisfy the Board, absent a confession. His record since 1982 has been exemplary. The Board certainly did not identify any lapses in his conduct or character. Nevertheless, the Board held that the facts of Mr. Guillen's life since 1982 were nullified by his refusal to confess.

Indeed, the Board actually imposed two reductive presumptions, neither of which is authorized by the statute. First, the Board reduced its inquiry under § 212(c) to one issue, that of rehabilitation. Then the Board reduced the issue of rehabilitation to one consideration – whether or not Mr. Guillen was willing to confess. Nothing in the statute contemplates this narrow, formalistic approach to evaluating a person's life and circumstances. When Congress enacted § 212(c), it avoided setting up mechanical tests for the granting of relief. Its purpose was to provide flexibility for worthy aliens to continue their lives and

family relationships in this country even when grounds for deportation have arisen. *See Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977). Rehabilitation is not an absolute prerequisite and is not the only relevant consideration. *Guillen I*, 999 F.2d at 205 (App. 33); *Matter of Edwards*, Interim Decision 3134, 1990 WL 385757, at 5 (BIA 1990). And rehabilitation, in turn, cannot depend solely on a willingness to confess. *Cf. Paz v. Warden*, 787 F.2d 469, 473 (10th Cir. 1986) (parole commission may not "require an offender to confess to his crimes as a prerequisite to a finding that the offender has been rehabilitated").

As the Board has previously conceded, it has failed to spell out definite "criteria for rehabilitation." *Palacios-Torres v. INS*, 995 F.2d 96, 99 (7th Cir. 1993). Several courts have also characterized the Board as predisposed against finding rehabilitation. *See, e.g., Tipu v. INS*, 20 F.3d 580, 586 (3d Cir. 1994); *Gonzalez v. INS*, 996 F.2d 804, 810 (6th Cir. 1993).

Given this history and the lack of clear standards, reviewing courts must be especially vigilant against the Board's use of impermissible tests to determine rehabilitation. As the Seventh Circuit has recognized, the basic question of rehabilitation is whether "future criminal conduct is unlikely." *Palacios-Torres*, 995 F.2d at 99. That question cannot turn on beliefs unrelated to conduct. It certainly cannot turn on whether someone is willing to make a ritualized confession. Confession may be good for the soul, but only if it is sincere. If it is insincere – if the confessor, rightly *or even wrongly*, does not believe he is guilty – then a confession betrays both the speaker and his audience, and debases the act of confession itself.

The only other factor invoked by the Board was the seriousness of the two crimes in question. But the Board's reliance on that circumstance is a makeweight. There is no dispute that the crimes were serious; their seriousness is *presumed*. The proceeding here was triggered precisely *because* the two crimes of which Mr. Guillen had been convicted were serious crimes involving "moral turpitude" within the meaning of § 241(a)(4). If relief is unavailable under § 212(c) simply because an alien fails to confess the serious crimes that initiated the proceeding, then the taking of evidence and all other aspects of the process are pointless. This short-circuits the careful, open-minded inquiry into all aspects of a person's present character and circumstances that § 212(c) requires.[2]

B. The Board Also Failed To Explain Its Decision

The Board's opinions are cursory and mechanical at best, even when both discussions are combined. The Board never explains how it evaluated all of the relevant factors, how it weighed them against each other, and how it concluded that Mr. Guillen's failure to confess undermined the evidence of his rehabilitation *and* all other

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[2] The Board also relied on mistaken testimony that Mr. Guillen was still on probation for his first conviction at the time of his second arrest. (App. 18-19.) Mr. Guillen's five-year probation for his May 1974 conviction apparently ended in May 1979. He was not arrested the second time until *August* 1979. (Administrative Record 232.) The Board's reliance on factual errors provides a further basis for reversal. *See, e.g., Tipu*, 20 F.3d at 586.

"outstanding equities" in his favor (equities which the Board did not contest).

The Board does not have to write a treatise to spell out the reasons for its decision. At the very least, however, it must "weigh important factors and . . . state its reasons for denying relief." *Vergara-Molina v. INS*, 956 F.2d 682, 685 (7th Cir. 1992). "A reviewing court must have confidence that the Board gave some weight to each factor in reaching its conclusion." *Palazzola v. INS*, 48 F.3d 1219, 1995 WL 101296, *4 (6th Cir. 1995) (table decision).

The Board must do more than merely mention relevant factors; it must actually weigh them. It must "announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Cortes-Castillo v. INS*, 997 F.2d 1199, 1203 (7th Cir. 1993). Here the Board merely listed relevant factors and then dismissed them. Thus, it failed to engage in a rational weighing of the evidence, and it failed to support its conclusions with "reasoned explanations based on legitimate concerns." *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991) (quoting *Vargas v. INS*, 831 F.2d 906, 908 (9th Cir. 1987)).

The lack of reasoned analysis confirms the Board's unauthorized reliance on *per se* presumptions. For example, in *Diaz-Resendez v. INS*, 960 F.2d 493, 498 (5th Cir. 1992), the Board's cursory analysis left the court "unpersuaded that the Board 'actually consider[ed]' and 'meaningfully addressed' all of the factors regarding rehabilitation" (quoting *Zamora-Garcia v. INS*, 737 F.2d 488, 490-91 (5th Cir. 1984)).

Here the Board's analysis boils down to one simplistic assertion – that because Mr. Guillen had been convicted of serious crimes, his "denial [of culpability] undermine[d] the evidence of reformation proffered by him." (App. 18.) Nowhere does the Board say *how* the evidence of reformation – which was manifold – had been undermined by Mr. Guillen's belief in his innocence. There was no proof that his belief was dishonest or insincere. (The Immigration Judge, who was the only one in a position to judge witnesses' credibility, specifically found Mr. Guillen credible and "very sincere." (App. 54.)) There was also no evidence that Mr. Guillen might commit future crimes. Having failed to address these issues of sincerity and the likelihood of future wrongdoing, the Board's decision is conclusory, and "[m]ere conclusory statements are inadequate." *Dragon v. INS*, 748 F.2d 1304, 1306 (9th Cir. 1984). *See also Bastanipour v. INS*, 980 F.2d 1129, 1131 (7th Cir. 1992).

Here the Board did nothing more than make a "scanty, illogical, and apparently ill-informed analysis of the record." *Bastanipour*, 980 F.2d at 1133. "When faced with cursory, summary or conclusory statements from the BIA, [the court] cannot presume anything other than such an abuse of discretion." *Anderson v. McElroy*, 953 F.2d 803, 806 (2d Cir. 1992).

The court of appeals failed to apply these established principles requiring an agency to explain its reasoning. The court simply said: "As long as the BIA indicated that it considered Mr. Guillen's evidence of rehabilitation, it was not required to discuss that evidence at length." *Guillen II*, 60 F.3d at 345. (App. 11-12.) This effectively allowed the Board to replace reasoned analysis with a

bare assertion that all relevant factors had been considered.

The court's laxity here is all the more troubling because, as the court itself acknowledged, a *higher* level of scrutiny should be applied when an agency has already been reversed once with specific instructions to explain its reasoning further, and then comes back with essentially the same result. *Guillen II*, 60 F.3d at 344 & n.5. (App. 10 & n.5.) The court paid lip service to that stricter standard but failed to apply it. The Board's second opinion was "a barren exercise of supplying reasons to support a pre-ordained result." *Food Marketing Institute v. ICC*, 587 F.2d 1285, 1290 (D.C. Cir. 1978).

CONCLUSION

The Board of Immigration Appeals does not have a roving commission to extract ritualized confessions of guilt on pain of deportation. At the very least, the Board should be required to explain how a refusal to confess proves something that bears upon an alien's conduct or inclinations and outweighs all countervailing evidence in his favor. Without this reasoned explanation, there can be no assurance that the Board has considered and properly balanced all relevant factors; there can be no effective judicial review; and, most important, there can be no assurance that the Board has avoided penalizing mere beliefs. Without those assurances, the Board has the unrestrained power to issue deportation orders that are arbitrary, unreviewable, and repugnant to the First Amendment.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 9, 1995

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-2559
LUIS GUILLEN-GARCIA

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals.
No. A14-478-717

ARGUED MARCH 30, 1995 – DECIDED JULY 17, 1995

Before FLAUM, RIPPLE and ROVNER, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Luis Guillen-Garcia has been denied a discretionary waiver of deportation by the Board of Immigration Appeals ("Board" or "BIA"). He seeks review of that decision before this court. This case is before us for the second time. In our previous review, we determined that the Board had failed to consider adequately "all the circumstances surrounding Mr. Guillen's efforts to demonstrate rehabilitation." *Guillen-Garcia v. INS*, 999 F.2d 199, 205 (7th Cir. 1993). We remanded the case with the direction that the BIA assess the matter of rehabilitation on the basis of *all* the relevant evidence. On remand, the BIA again denied Mr. Guillen's

application for a waiver of his deportation and ordered him deported. Mr. Guillen, claiming that the Board refused to consider all the evidence, petitions this court once more to review and to overturn the BIA decision. For the reasons explained in the following opinion, we affirm the decision of the BIA.

I

BACKGROUND

Mr. Guillen is a native of Mexico who has resided in the United States since the age of fourteen as a lawful permanent resident. He is married to a United States citizen and has five children, all of whom are United States citizens. As we explained in detail in our earlier opinion, *see* 999 F.2d at 201-02, Mr. Guillen was convicted, on two occasions, of serious criminal offenses involving the use of a gun. First, following an indictment, which included the charge of attempted murder, Mr. Guillen pled guilty in 1974 to three counts of aggravated battery and received a five-year probationary sentence. While still on probation, he was arrested for attempted murder; he was tried, convicted, and sentenced to ten years of imprisonment. Mr. Guillen satisfactorily served his sentence and parole and was discharged from supervision in 1989.

In 1984, the Immigration and Naturalization Service ("INS") issued an Order to Show Cause charging him with deportability under section 241(a)(4) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1251(a)(4) (1988), as an alien convicted after entry of two crimes

involving moral turpitude.[1] Mr. Guillen conceded deportability, but requested a waiver of inadmissibility. He applied for discretionary relief under section 212(c) of the Act.[2] Mr. Guillen based his request for relief on his rehabilitation (earning diplomas in welding and auto mechanics, studying the Bible during his time in prison;

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[1] Section 241(a)(4) of the Act, recodified at 8 U.S.C. § 1251(a)(2)(A)(ii), in relevant part provides:

> Any alien . . . in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens:
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> * * *
>
> Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

[2] Section 212(c) of the Act, codified at 8 U.S.C. § 1182(c), provides:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

Section 212(c) also applies to lawful permanent residents facing deportation who have not left the United States but meet the seven-year requirement. *Castellon-Contreras v. INS*, 45 F.3d 149, 151 n. 2 (7th Cir. 1995); *Cortes-Castillo v. INS*, 997 F.2d 1199, 1202 (7th Cir. 1993).

working hard and consistently to provide for his family and continuing Bible study since his release from prison), his close family ties, and his innocence of the crimes for which he had been convicted.[3] *See* 999 F.2d at 201-02. The immigration judge found that Mr. Guillen was deportable, but granted his request for a section 212(c) waiver of inadmissibility on the basis that the positive factors associated with his application, including credible evidence of rehabilitation, out-weighed the negative factors. Nevertheless, the BIA overturned the immigration judge's ruling and denied the waiver application. It concluded that the petitioner's refusal to acknowledge guilt for his crimes was a clear indication that he was not rehabilitated. Mr. Guillen then sought our review of the BIA decision.

After reviewing the Board's decision, we remanded the case to the BIA.[4] 999 F.2d at 205. We noted that

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[3] With respect to his first conviction, Mr. Guillen testified at the waiver hearing that a distant cousin had put a gun in his hand, after firing it, and that the police officer had then arrested him. He stated that he had pleaded guilty to aggravated battery charges in order to receive probation. Concerning the circumstances underlying his second conviction, he testified that he had been shot when he tried to pass by a group of men fighting in the street, and after he woke up in the hospital he learned that he was accused of attempted murder. *See* 999 F.2d at 201.

[4] Concerning the level of review accorded to a final order of deportation, we stated:

> The decision to grant section 212(c) relief is discretionary, and our review is accordingly "limited to whether the discretion was actually exercised and whether it was exercised in an arbitrary or capricious manner." Under this standard, we shall reverse a discretionary determination by the BIA only if it "was

rehabilitation is an important factor in the decision to grant section 212(c) relief and that, ordinarily, it is a factor that must be established before relief can be granted. We also recognized, however, that it is not an absolute prerequisite to relief. Similarly, we noted that, in determining whether an applicant is rehabilitated, acknowledgement of culpability is an important, although not an exclusive, factor to consider. We directed the Board to reconsider and to clarify its determination that Mr. Guillen had not been rehabilitated. "This determination must be made on the basis of all relevant evidence, not merely his refusal to admit guilt." *Id.* Nonetheless, we recognized that this court does not "have authority to determine the weight that the BIA should afford to the factors in favor of granting a section 212(c) petition." *Id.*

On remand the Board reconsidered its earlier decision. *See* BIA Order of June 17, 1994, Admin.R. at 2. Concerning its method for assessing whether a showing of rehabilitation was present, the BIA explained that it had relied solely on the evidence presented during the course of the proceedings, and necessarily had made a "judgment call" in predicting the petitioner's future conduct. Admin.R. at 3 (quoting *Guillen-Garcia*, 999 F.2d at 205). The BIA also stated that it did not intend to treat the acknowledgment of culpability as the only relevant factor

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made without a rational explanation, it inexplicably departed from established policies, or it rested on an impermissible basis. . . . "

Guillen-Garcia, 999 F.2d at 203 (quoting *Cordoba-Chaves v. INS*, 946 F.2d 1244, 1246 (7th Cir. 1991)). We follow that same standard in this successive appeal.

to be used in determining whether an alien ought to be granted discretionary relief. Nevertheless, the BIA stressed, "the admission of guilt can be an important step to a positive showing of reformation." *Id.* The Board then evaluated Mr. Guillen's rehabilitation:

> In the present case, we assess the respondent's continued employment, his statements regarding deep family concerns, compliance with his probation requirements, his classes while imprisoned, and his refusal to acknowledge guilt for his 1974 conviction for two counts of aggravated battery and his 1984 conviction for attempted murder. *When we add the respondent's denial of culpability for the two counts forming his conviction in 1974 and his denial of culpability for his conviction in 1984, these denials undermine the evidence of reformation proffered by him;* i.e., his statements regarding deep family concerns, his compliance with his probation requirements, his conduct while confined including the classes he took, and his continued employment. While the passage of 6 years has occurred between the date of his release from confinement after his last conviction and the last occasion in which the respondent has provided evidence to us (his April 1992 motion to supplement the record), the crucible of time is not overly significant in this particular case since more than 6 years passed between the dates of the commission of the respondent's criminal offenses. As the respondent testified, he had not completed his probation for his aggravated battery offenses when he was arrested for his attempted murder offense (Tr. at 21-22). Taking these factors together, we conclude that the

> respondent has not demonstrated reliable evidence of his rehabilitation such that we would consider rehabilitation as an additional equity in his favor.

Admin.R. at 3-4 (emphasis added). The Board concluded that rehabilitation could not be considered a favorable factor for Mr. Guillen because he did not present sufficient evidence of rehabilitation. The Board then "weigh[ed] the outstanding equities[,] as discussed in our original decision and incorporated here, against the adverse factors." Order at 3. On that basis, the Board denied Mr. Guillen's application for waiver of inadmissibility:

> In the exercise of our discretion, we conclude that the very serious nature of the respondent's convictions, particularly his conviction for attempted murder[,] outweigh the equities presented by him such that it is not in the best interest of this country to grant the respondent's application for a waiver of inadmissibility under section 212(c) of the Act.

Admin.R. at 4. The petitioner then timely appealed the BIA determination to this court.

II

DISCUSSION

Mr. Guillen submits that the BIA abused its discretion in two ways. We shall address each in turn.

A.

Mr. Guillen first asserts that the Board's decision on remand failed to abide by this court's direction that Mr. Guillen's rehabilitation be assessed "on the basis of all relevant evidence, not merely his refusal to admit guilt." 999 F.2d at 205. He characterizes the Board's response to our mandate as a cursory three-page decision that lacks careful deliberation concerning Mr. Guillen's efforts toward rehabilitation or serious consideration of this court's ruling. It failed to mention, he contends, the immigration judge's findings concerning Mr. Guillen's sincere demeanor and his conclusion that Mr. Guillen was rehabilitated. The petitioner submits that the evidence of record shows that he clearly is a man who has been rehabilitated and is entitled to relief from deportation. He submits that he has admitted that he was convicted of two criminal offenses, has accepted his punishment, and has conceded deportability based on those convictions. Therefore, he continues, the only negative factor in the Board's rehabilitation determination is his failure to admit his guilt of the crimes for which he was convicted. According to Mr. Guillen, his belief in his own innocence in no way undermines the overwhelming evidence of reformation that he proffered to the immigration judge. In Mr. Guillen's view, therefore, the BIA improperly continued to consider his assertion of innocence as the exclusive relevant factor in its analysis of rehabilitation. The Board's failure to consider and to address in a meaningful way all of the factors regarding rehabilitation, in direct contravention to this court's order, was, he submits, an abuse of discretion.

1.

In evaluating Mr. Guillen's position, we note at the outset that the parties do not dispute that the BIA, when reviewing an immigration judge's grant of discretionary relief, conducts a de novo review of the administrative record. *See* BIA Order of Aug. 13, 1992, Admin.R. at 22; *Cordoba-Chaves v. INS*, 946 F.2d 1244, 1249 (7th Cir. 1991) (BIA could review entire administrative record de novo). We also point out, as a prefatory matter, that the applicant seeking a waiver of inadmissibility has the burden of proving that he merits the waiver by showing his rehabilitation and other favorable factors. *Palmer v. INS*, 4 F.3d 482, 487 (7th Cir. 1993) (stating that "the alien bears the burden of demonstrating both statutory eligibility and equities meriting favorable exercise of the Attorney General's discretion"). The Board's review must be made on the entire record. Positive factors, indicating that the petitioner deserves to remain in the United States, include his family ties in this country, his long-term residence, hardship to the family in case of deportation, military service, employment history, community service, good character, and genuine rehabilitation. In the course of its review, the Board assesses whether "indicia of rehabilitation" are present by examining independently the record before it. *See* BIA Order of June 17, 1994, at 2. Adverse factors include the reasons offered to justify deportation or exclusion, any criminal record, immigration violations, bad character, or other evidence of undesirability as a permanent resident. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1202 (7th Cir. 1993); *Akinyemi v. INS*, 969 F.2d 285, 288 (7th Cir. 1992) (quoting factors listed in *Matter of Marin*, 16 I & N Dec. 581, 584-85 (BIA 1978)).

In contrast to the Board's plenary review of the immigration judge's ruling, our review of the BIA's denial of relief under section 212(c) is conducted under the deferential abuse of discretion standard. *See supra* note 4. We shall uphold the BIA's decision unless " 'it was made without rational explanation, it inexplicably departed from established policies, or it rested on an impermissible basis. . . . ' " *Guillen-Garcia*, 999 F.2d at 203 (quoting *Cordoba-Chaves*, 946 F.2d at 1246); *see also Cortes-Castillo*, 997 F.2d at 1203 ("The Board abuses its discretion when it fails to weigh important factors or neglects to state its reasons for denying relief."). Nevertheless, when a case returns to us for a second time after we have remanded it with explicit instructions to the BIA, we examine with care the order of the Board to ensure that our earlier decision has been followed.[5]

2.

In determining the issue of rehabilitation, the Board relied on its original decision as well as its decision on remand. It determined that "the respondent has not demonstrated reliable evidence of his rehabilitation such that we would consider rehabilitation as an additional equity in his favor." Admin.R. at 4. In its first decision, the BIA

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[5] *Cf. Greyhound Corp. v. ICC*, 668 F.2d 1354, 1358 (D.C. Cir. 1981) (applying "a somewhat greater degree of scrutiny to an order that arrives at substantially the same conclusion as an order previously remanded by the same court"); *Food Mktg. Inst. v. ICC*, 587 F.2d 1285, 1290 (D.C. Cir. 1978) (employing greater scrutiny after remanding to the agency "to elaborate its reasoning").

had focused on the serious nature of Mr. Guillen's crimes and had concluded that Mr. Guillen's denial of his guilt was a failure to accept responsibility for his convictions, a failure which reflected a lack of rehabilitation. In the second ruling, the Board noted that the petitioner was arrested for his second offense while he was still on probation for the first conviction. This evidence, combined with Mr. Guillen's denial of culpability, undermined the other evidence of his reformation and, in the end, defeated his claim of rehabilitation as an additional equity.

"[R]ehabilitation is an important factor to be considered in exercising discretion in a case of an applicant who has a criminal record." *Groza v. INS*, 30 F.3d 814, 820 (7th Cir. 1994). However, as we noted in our prior opinion, " '[r]ehabilitation is scarcely a readily determinable fact in the ordinary sense and the Board necessarily makes a judgment call, involving an estimate or prediction of an individual's future conduct.' " *Guillen-Garcia*, 999 F.2d at 205 (quoting *Palacios-Torres v. INS*, 995 F.2d 96, 99 (7th Cir. 1993)). The criteria for rehabilitation are fact-specific, and the weighing of those criteria is highly discretionary. *See Guevara v. INS*, 52 F.3d 714, 715 (7th Cir. 1995) (declining to determine weight to be given to each examined factor). On remand the Board did consider Mr. Guillen's conduct while in prison and after his release, and the apparent law-abiding lifestyle he has led since his time in prison. After reviewing those factors, however, the Board weighed as well the two convictions and Mr. Guillen's denial of culpability. It concluded that Mr. Guillen presented insufficient evidence of rehabilitation to justify its consideration as an additional favorable equity. As long

as the BIA indicated that it considered Mr. Guillen's evidence of rehabilitation, it was not required to discuss that evidence at length.[6] It was entitled to conclude, in its discretion, that his denial of responsibility would tip the balance against a finding of rehabilitation. We shall not disturb its decision.

Turning to the ultimate question for decision – the grant of § 212(c) relief – the BIA then concluded that the adverse factors (his very serious convictions) outweighed the outstanding equities (which, as we have just noted, did not include rehabilitation). Therefore Mr. Guillen's waiver application was denied. When it weighed the favorable factors against the serious nature of Mr. Guillen's convictions, the Board obviously placed great weight on the seriousness of the offenses committed by Mr. Guillen. The seriousness of the crimes may in fact be ultimately determinative in the Board's assessment. *Akinyemi*, 969 F.2d at 288 (stating that, "in exercising its discretion, the BIA may determine that the seriousness of the offense and other negative factors outweigh even unusual or outstanding equities"); *see also Matter of Marin*, 16 I & N Dec. at 584-85.

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[6] *See Groza*, 30 F.3d at 820 (stating that the Board is not required to mention every piece of rehabilitation evidence submitted, but must show it heard and considered that evidence); *Osuchukwu v. INS*, 744 F.2d 1136, 1142-43 (5th Cir. 1984) (stating that Board "has no duty to write an exegesis on every contention," but need only "consider the issues raised . . . in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted").

This considered weighing of factors by the Board was not arbitrary or capricious. We cannot say that the decision of the BIA was "made without a rational explanation" or that it "inexplicably departed from established policies" or "rested on an impermissible basis." When the two opinions of the BIA are read together, it is clear that the Board properly exercised its discretion; it weighed all the factors and explained its decision. The Board had the discretion to place great weight upon the fact that both crimes committed by Mr. Guillen involved the use of force and violence, and that the second occurred during the probationary period of the first.[7] We therefore must deny the petition and affirm the decision of the Board.

B.

Mr. Guillen also argues that the Board abused its discretion because it decided his case differently from a factually similar case and gave no rational explanation for the distinction. He relies upon an unpublished opinion, *In re Juan Manuel Medina-Herrera*, A10 456 079 (BIA Sept. 30, 1992). In that case, the petitioner, a long-time lawful permanent resident from Mexico, was convicted of conspiracy to distribute and to possess heroin and cocaine. At the deportation hearing he denied involvement in the drug conspiracy. The immigration judge found that the applicant's demeanor when denying guilt demonstrated a lack of remorse and rehabilitation. The

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[7] *Cf. Palmer*, 4 F.3d at 489 (noting that the BIA determines the relative significance of a conviction, and need not share the petitioner's perspective on the events that resulted in a guilty plea).

Board reversed, concluding that the petitioner had established rehabilitation, and that the only adverse factor was his conviction for drug conspiracy. Mr. Guillen submits that the Board's treatment of his case and Juan Manuel's is so inconsistent as to reflect an abuse of discretion.

Mr. Guillen's reliance on *Medina-Herrera* is not helpful. Unpublished opinions of the Board of Immigration Appeals have no precedential value. *See* 8 C.F.R. § 3.1(g) (only "selected decisions designated by the Board shall serve as precedents in all proceedings involving the same issue or issues"); *Douglas v. INS*, 28 F.3d 241, 245 (2d Cir. 1994). The *Medina-Herrera* decision therefore does not bind the INS or even reflect the policy of the Board; it certainly is not a decision from which the Board "inexplicably departed" when deciding Mr. Guillen's case. Even if Mr. Guillen could rely on *Medina-Herrera*, however, the facts of that case are sufficiently distinguishable from the ones before us to allow us to conclude that there was no inconsistency in the decisions.[8]

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[8] In *Medina-Herrera*, the respondent had only one conviction, and his role in the conspiracy apparently involved merely answering the telephone. The immigration judge considered the respondent's portrayal of his minor role in the conspiracy to demonstrate a lack of remorse and rehabilitation; the BIA, however, found that, when it considered all of the evidence of rehabilitation presented by the respondent, the demeanor on which the immigration judge focused was not controlling. It concluded that the respondent made a favorable showing of rehabilitation.

Conclusion

For the foregoing reasons we affirm the decision of the Board and deny Mr. Guillen's petition for review.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

File: A14 478 717 – Chicago Date: JUN 17 1994

In re: LUIS GUILLEN-GARCIA a.k.a. Romeo Lopez

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Susan Schreiber, Esquire
Travelers & Immigrants Aid of Chicago
327 South LaSalle Street, Room 1400
Chicago, Illinois 60604

ON BEHALF OF SERVICE:
Alexandra Kostich
General Attorney

CHARGE:

Order: Sec. 241(a)(4), I&N Act [8 U.S.C. § 1251(a)(4)] – Convicted of crimes involving moral turpitude

APPLICATION: Waiver of inadmissibility

On July 2, 1993, the United States Court of Appeals for the Seventh Circuit (Seventh Circuit) remanded the record to us for "reconsideration and clarification of [our] determination that [the respondent] has not been rehabilitated," as discussed in our decision dated August 13, 1992, sustaining the appeal of the Immigration and Naturalization Service and denying the respondent's application for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). *Guillen-Garcia v. INS*, 999 F.2d 199, 205 (7th Cir. 1993). As instructed, we have reconsidered and now clarify our order accordingly.

Incorporating the facts of the case as discussed in our decision dated August 13, 1992, we initially emphasize as

we stated, "that a clear showing of reformation is not an absolute prerequisite to a favorable exercise of discretion in every case involving an alien with a criminal record." Decision of the Board of Immigration Appeals, at 5. Rehabilitation or the lack of any showing thereof is one factor which we consider in assessing whether it is in the best interests of this country to grant a waiver of inadmissibility to an alien who has been convicted of a crime. *See Gouveia v. INS*, 980 F.2d 814 (1st Cir. 1992); *Martinez v. INS*, 970 F.2d 973 (1st Cir. 1992); *Ashby v. INS*, 961 F.2d 555 (5th Cir. 1992); *Nunez-Pena v. INS*, 956 F.2d 223 (10th Cir. 1992). If a waiver of inadmissibility applicant demonstrates a clear showing of reformation, then we can consider the positive showing of rehabilitation as an equity in conjunction with the other favorable factors, which ultimately are balanced against the unfavorable factors of record.

In assessing whether a showing of rehabilitation is present, we rely only on the evidence presented during the course of the proceedings. The burden of proof to show that one merits a waiver of inadmissibility is on the applicant. As part of that burden, an alien bears the burden of showing rehabilitation where that is an issue. In analyzing a record to assess whether indicia of rehabilitation are present, we are mindful of the Seventh Circuit's observation that "[r]ehabilitation is scarcely a readily determinable fact in the ordinary sense and the Board necessarily makes a judgment call, involving an estimate or prediction of an individual's future conduct." *Guillen-Garcia v. INS*, *supra*, at 205, quoting, *Palacios-Torres v. INS*, 995 F.2d 96, 99 (7th Cir. 1993). Our assessment is based solely on the record that is before us.

We did not intend in our original order to state or imply that the acknowledgment of culpability was the only factor which we used to determine whether an alien ought to be granted a favorable exercise of discretion under section 212(c) of the Act. *See Guillen-Garcia v. INS, supra,* at 205; *Gouveia v. INS, supra,* at 818. In determining whether a respondent has made a favorable showing of rehabilitation, we do not apply a per se rule that a failure to admit guilt with respect to the convictions forming the basis of the deportation proceedings negates a finding that he is rehabilitated. As we attempted to state in our decision, the admission of guilt can be an important step to a positive showing of reformation; however, it is not the only factor. We attempt to weigh the evidence which is presented.

In the present case, we assess the respondent's continued employment, his statements regarding deep family concerns, compliance with his probation requirements, his classes while imprisoned, and his refusal to acknowledge guilt for his 1974 conviction for two counts of aggravated battery and his 1984 conviction for attempted murder. When we add the respondent's denial of culpability for the two counts forming his conviction in 1974 and his denial of culpability for his conviction in 1984, these denials undermine the evidence of reformation proffered by him; i.e., his statements regarding deep family concerns, his compliance with his probation requirements, his conduct while confined including the classes he took, and his continued employment. While the passage of 6 years has occurred between the date of his release from confinement after his last conviction and the

last occasion in which the respondent has provided evidence to us (his April 1992 motion to supplement the record), the crucible of time is not overly significant in this particular case since more than 6 years passed between the dates of the commission of the respondent's criminal offenses. As the respondent testified, he had not completed his probation for his aggravated battery offenses when he was arrested for his attempted murder offense (Tr. at 21-22). Taking these factors together, we conclude that the respondent has not demonstrated reliable evidence of his rehabilitation such that we would consider rehabilitation as an additional equity in his favor.

In reaching this conclusion, we do not find that the respondent should be denied a waiver of inadmissibility solely because he denied culpability for the acts forming his convictions. Instead, we weigh the outstanding equities as discussed in our original decision and incorporated here, against the adverse factors. In determining the favorable factors, we do not include as a favorable equity the presence of rehabilitation since we do not believe that the respondent has presented sufficient evidence in the record before us to make such a showing as discussed above. In weighing the favorable factors against the adverse factors of record, namely, his very serious convictions, we conclude, as we did in our prior decision, that they outweigh the outstanding equities presented. In the exercise of our discretion, we conclude that the very serious nature of the respondent's convictions, particularly his conviction for attempted murder outweigh the equities presented by him such that it is not in the best

interests of this country to grant the respondent's application for a waiver of inadmissibility under section 212(c) of the Act.

Accordingly, after reconsideration, we modify and clarify our decision dated August 13, 1992, as stated above.

ORDER: Our decision dated August 13, 1992, is modified and clarified as stated above, and the orders stated therein are adopted herein.

/s/ Mary Maguire Dunne
Acting Chairman

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 92-3731

LUIS GUILLEN-GARCIA

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an
Order of the Immigration &
Naturalization Service
No. A14-478-717

ARGUED APRIL 27, 1993 – DECIDED JULY 2, 1993

Before FLAUM, RIPPLE, and ROVNER, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Luis Guillen-Garcia, a native of Mexico who has resided in the United States for twenty-seven years and who is a lawful permanent resident, petitions for review of the decision of the Board of Immigration Appeals (BIA) that refused to grant him a discretionary waiver of deportation under section 212(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. Sec. 1182(c) (1988). Mr. Guillen-Garcia contends that the BIA abused its discretion in denying him relief. Because the

BIA did not consider adequately the issue of rehabilitation, we grant the petition for review and remand the case to the BIA for further proceedings.

I

BACKGROUND

Mr. Guillen-Garcia (Mr. Guillen)[1] has resided in the United States since the age of fourteen. He is married to a United States citizen and has five children, all of whom are United States citizens. Additionally, his parents are lawful permanent residents, and he has four siblings who are citizens and three siblings who are lawful permanent residents.

On May 10, 1974, Mr. Guillen was convicted of two counts of aggravated battery for causing great bodily harm to another individual, and of one count of aggravated battery through the use of a deadly weapon. He was sentenced to five years of probation. On April 18, 1984, Mr. Guillen was convicted of attempted murder and was sentenced to ten years imprisonment, but served only four and a half years of the sentence and was then placed on probation for the remainder of his term.

As a result of his convictions, the Immigration and Naturalization Service (INS) issued an Order to Show Cause and Notice of Hearing to Mr. Guillen on July 30, 1984, charging him with deportability as an alien who has been convicted of two crimes involving moral turpitude

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[1] In his brief, Mr. Guillen-Garcia refers to himself as Mr. Guillen and thus we will respect his preference and also refer to him by that name throughout this opinion.

not arising out of a single scheme of criminal conduct. *See* 8 U.S.C. Sec. 1254(a)(4). In the deportation proceedings held before an Immigration Judge (IJ), Mr. Guillen conceded that he was deportable, but requested a waiver of inadmissibility under section 212(c) of the Act.

At the waiver hearing, Mr. Guillen testified that he was innocent of the crimes for which he had been convicted. He stated that he had pleaded guilty to the aggravated battery charges on the advice of his public defender, who informed him that he would receive probation by doing so. According to Mr. Guillen, the incident leading to his conviction occurred when he and some friends had attended a dance, at which a fight ensued when other men tried to take away Mr. Guillen's and his friends' dates. He testified that a distant cousin had a gun, which his cousin fired and then placed in Mr. Guillen's hands. At that time, a police officer saw Mr. Guillen with the gun, told him to discard it, and then arrested him. Mr. Guillen further testified that he did not then own and has never owned a gun.

As to the attempted murder conviction, Mr. Guillen testified that he had gone out to buy a soft drink and encountered a group of men fighting on the street. He stated that he asked them to let him pass, but he was shot in the back and leg, lost consciousness, and woke up in the hospital. On cross-examination, Mr. Guillen claimed that he believed he had been shot by an unidentified police officer. Although he was convicted of attempted murder following a jury trial, Mr. Guillen denied possessing a weapon at any time during the night in question. Mr. Guillen testified that, after his conviction, he was

under the impression that his public defender was going to pursue an appeal on his behalf but none was filed.

Mr. Guillen testified that, while in prison, he worked as a cook and was paid approximately $100.00 per month, about half of which he retained for his own use, and the remainder of which he sent to his wife. During cross-examination of Mrs. Guillen, however, she stated that her husband had sent her money only for one year during his prison term. Mr. Guillen stated that he earned diplomas in welding and mechanics while incarcerated, that he was visited about twice a month by relatives, and that he studied the Bible during his free time. After his release from prison, Mr. Guillen was employed by C.E. Smith in lawn maintenance. Subsequently, he was employed by Parent Petroleum, where he has a long employment history. Since his release from prison, Mr. Guillen testified that his wife and children have not received any public assistance and that he and his family are active in a Bible class sponsored by the church they attend.

Mr. Guillen further testified that he has left the United States only once since he began to reside here, and that his wife and children had lived in Puerto Rico for approximately one year when her mother and father were in ill health. According to Mr. Guillen, his children attended school in Puerto Rico but did not adjust well because they did not speak Spanish fluently and had difficulty making friends. Mr. Guillen stated that his wife and children would not accompany him if he were deported to Mexico, that his wife has no relatives there, and that he has only one relative there, an uncle whom he has never met. He further testified that he doubted his

wife alone would be able to support herself and their children if he were deported.

During the hearing, Mrs. Guillen and two of the Guillens' children also testified concerning the hardship that would befall them if Mr. Guillen were deported. Mrs. Guillen further testified that their oldest daughter had developed ulcers and psychiatric problems during Mr. Guillen's incarceration. In addition, she testified that she has a steady factory job earning approximately $4.50 per hour, and that she lives very close to her brother and sister-in-law. Finally, in response to a question by the IJ, Mrs. Guillen indicated that, to her knowledge, her husband has never owned a gun.

Numerous relatives also testified or submitted affidavits to the effect that the Guillens have a close-knit family and that Mr. Guillen tends either to stay at home or to attend family functions. Mr. Guillen's parents testified that they were ill, that their son and other children live close to them and help them out, and that Mr. Guillen contributes about $20.00 per week toward their support. Letters from Mr. Guillen's church and employer attested to his good character and work record. Finally, a letter from his parole officer stated that Mr. Guillen was under minimum supervision at the time of the hearing, although during cross-examination Mr. Guillen stated that he had personally spoken to his parole officer only on two occasions.

II

THE DECISION OF THE IMMIGRATION JUDGE

The IJ found Mr. Guillen to be deportable and then turned to the issue of Mr. Guillen's request for section 212(c) relief. As a threshold matter, the IJ first determined that Mr. Guillen was statutorily eligible for such relief because he had proven that he had an unrelinquished domicile of seven consecutive years following a grant of permanent resident status. The IJ next applied the principles set forth in *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), which requires a balancing of the adverse and favorable factors surrounding an applicant's petition for section 212(c) relief. On the basis of *Marin*, Mr. Guillen was required to demonstrate unusual or outstanding equities in order to qualify for a favorable exercise of discretion based on the seriousness of the crimes of which he was convicted.

The IJ found that the negative factors with respect to Mr. Guillen's waiver application were the two convictions. While acknowledging that it was impermissible to challenge the convictions within the context of the deportation proceedings, the IJ determined that he could take into consideration Mr. Guillen's explanations of the circumstances surrounding their commission. The favorable factors in the analysis included Mr. Guillen's length of residence in this country, his early age at the time of arrival, his family ties, his employment history, his family's hardship if he were deported, and his rehabilitative efforts. On balance, the IJ found that the positive factors associated with Mr. Guillen's application for section

212(c) relief outweighed the negative factors. Accordingly, the IJ granted Mr. Guillen's request for a section 212(c) waiver.

III

PROCEEDINGS BEFORE THE BIA

The INS appealed the decision to the BIA. It argued that the IJ had erred in determining that Mr. Guillen had demonstrated rehabilitation, that the IJ had erred in finding that Mr. Guillen had demonstrated outstanding equities warranting a favorable exercise of discretion, and that the IJ had erred in considering Mr. Guillen's claims of innocence with respect to the convictions that formed the basis of the deportation proceedings. In reversing the IJ's decision to grant Mr. Guillen a section 212(c) waiver, the BIA determined that Mr. Guillen had demonstrated outstanding equities but nonetheless failed to qualify for section 212(c) relief because his denial of guilt regarding the convictions demonstrated a failure to accept responsibility and a lack of rehabilitation.

The BIA determined that the IJ had erred in accepting Mr. Guillen's versions of the events surrounding his convictions. In the BIA's view, the IJ had allowed Mr. Guillen to mount a collateral attack on the judgments of conviction. Board Decision at 5. Next, the BIA determined that, in light of the serious nature of the convictions, Mr. Guillen was required to demonstrate outstanding equities in order to qualify for section 212(c) relief. *Id.* at 6. Reviewing the evidence submitted, the BIA determined that the favorable factors regarding Mr. Guillen's petition were his length of residence in this country, his arrival

here at a young age, his marriage to a United States citizen, his five children's American citizenship, his strong family ties in the United States, his consistent employment history, his residence with and support of his family, his church attendance and study of the Bible, and his family's hardship if he were deported. These favorable factors were sufficient, held the BIA, to establish outstanding equities. *Id.* at 6-7.

Next, the BIA considered the factors that were adverse to Mr. Guillen's section 212(c) application. *Id.* at 7. It found that, in light of Mr. Guillen's refusal to acknowledge guilt as to his convictions, the IJ had erred in determining that Mr. Guillen was rehabilitated. *Id.* The BIA further determined that the very serious nature of Mr. Guillen's crimes counseled against a favorable exercise of discretion on his behalf and thus it denied Mr. Guillen's waiver application. *Id.* at 8.

IV
ANALYSIS

A. *Standard of Review*

Pursuant to 8 U.S.C. Sec. 1105a(a), we have jurisdiction to review final deportation orders. The decision to grant section 212(c) relief is discretionary, and our review is accordingly "limited to whether the discretion was actually exercised and whether it was exercised in an arbitrary or capricious manner." *Cordoba-Chaves v. INS*, 946 F.2d 1244, 1246 (7th Cir. 1991). Under this standard, we shall reverse a discretionary determination by the BIA only if it "was made without a rational explanation, it inexplicably departed from established policies, or it

rested on an impermissible basis. . . . " *Id.* (citing *Bal v. Moyer,* 883 F.2d 45, 46 (7th Cir. 1989)).

Aliens who have been lawful permanent residents for seven years and whose deportations have been ordered for certain specified grounds are statutorily eligible to apply for section 212(c) relief. *Akinyemi v. INS,* 969 F.2d 285, 288 (7th Cir. 1992). Statutory eligibility for section 212(c) relief does not establish an entitlement to a waiver of deportation, but instead requires the Attorney General (or the BIA as delegate) to balance the social and humane considerations in favor of the alien against adverse factors that demonstrate his undesirability as a permanent United States resident. *Id.* The alien bears the burden of showing that he warrants a favorable exercise of discretion, and the BIA may require a heightened showing of favorable equities in the presence of serious adverse factors. *Id.* Favorable factors to be considered include

> family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character.

Matter of Marin, 16 I & N Dec. at 583. The BIA must conduct a full exploration of the equities associated with the alien's application, but even a showing of outstanding

equities does not require a favorable exercise of discretion; rather, the BIA may determine that the presence of negative factors outweighs unusual or even outstanding equities. *Akinyemi*, 969 F.2d at 288.

B. *Positions of the Parties on Appeal*

Mr. Guillen contends that the BIA abused its discretion in refusing his application for section 212(c) relief. In his view, the BIA failed to consider adequately important aspects of his case, including his post-conviction behavior and the emotional and financial hardship that he and his family would suffer if he were deported. He further contends that the BIA abused its discretion in applying a per se rule that the failure to acknowledge guilt as to the convictions underlying a deportation proceeding negates a finding of rehabilitation. Finally, he contends that the evidence he presented at the waiver hearing was sufficient to establish his entitlement to section 212(c) relief. By contrast, the INS urges us to deny the petition for review on the ground that the BIA adequately considered the record of the waiver proceedings and appropriately exercised its discretion in denying a section 212(c) waiver to Mr. Guillen.

C. *Discussion*

1.

At the outset, it is important to note that, in many respects, the BIA's review of this case is comprehensive. We set out in detail those contentions that the BIA correctly addressed.

Mr. Guillen's contention that the BIA failed to consider adequately his post-conviction behavior and the hardship that he and his family would suffer if he were deported is without merit. We have previously stated that the BIA need not "write an exegesis on every contention." *Akinyemi*, 969 F.2d at 289 (quoting *Becerra-Jimenez v. INS*, 829 F.2d 996, 1000 (10th Cir. 1987)). The BIA must consider and assess the record as a whole and render an opinion that reflects a reasoned decision. *Id.* We must be vigilant that, in considering claims alleging the BIA failed to consider adequately the evidence presented, we do not reweigh the evidence and substitute our own judgment for that of the BIA. *See Cordoba-Chaves*, 946 F.2d at 1246.

The BIA's decision demonstrates that it adequately considered Mr. Guillen's post-conviction behavior, particularly his employment history, his support of his family, and his religious practices. Specifically, the BIA found those factors to constitute outstanding equities in Mr. Guillen's favor. Similarly, the BIA's decision also demonstrates that it adequately considered the hardship that would result to Mr. Guillen and to his family if he were deported, although it found the degree of hardship to be less extreme than had the IJ. Accordingly, we cannot accept Mr. Guillen's contention that inadequate consideration was given either to his post-conviction behavior or to the hardship that he and his family would suffer upon his deportation.

2.

We now come to the one aspect of the BIA's otherwise careful opinion that gives us pause. Mr. Guillen

contends that the BIA applied a per se rule that his failure to admit guilt with respect to the convictions forming the basis of his deportation proceedings negates a finding that he is rehabilitated.

We agree with the BIA that an alien seeking section 212(c) relief may not use the waiver hearings as a means to mount a collateral attack on a judgment of conviction. *Rassano v. INS*, 377 F.2d 971, 974 (7th Cir. 1966) (orderly administration of justice requires that the INS and reviewing court go no further than judgment of conviction in deportation proceedings).[2] We also agree that Mr. Guillen's crimes were of a serious and violent nature, and, because they formed the basis of the deportation proceedings, the BIA was obligated to examine the gravity of this criminal activity. *Cordoba-Chaves*, 946 F.2d at 1247. Furthermore, the BIA correctly held that Mr.

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[2] *See also Trench v. INS*, 783 F.2d 181, 184 (10th Cir.) (alien cannot use deportation proceedings to collaterally attack state law conviction), *cert. denied*, 479 U.S. 961 (1986); *Avila-Murrieta v. INS*, 762 F.2d 733, 736 (9th Cir. 1985) (INS may not examine validity of conviction for deportation purposes); *Zinnanti v. INS*, 651 F.2d 420, 421 (5th Cir. 1981) (per curiam) (immigration authorities must look solely to judicial record of final conviction and may not make independent assessment of validity of guilty plea); *Chiaramonte v. INS*, 626 F.2d 1093, 1098 (2d Cir. 1980) (alien adjudged guilty by foreign tribunal may not mount collateral attack on conviction in deportation proceedings); *Longoria-Castenada v. INS*, 548 F.2d 233, 236 (8th Cir.) (immigration authorities may not go beyond judicial record of conviction to make an independent determination of guilt or innocence), *cert. denied*, 434 U.S. 853 (1977); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 570 (6th Cir. 1975) (same), *cert. denied*, 423 U.S. 1050 (1976).

Guillen's criminal history was such that he must demonstrate outstanding equities in order to qualify for a favorable exercise of discretion with respect to his section 212(c) application. *See id.* ("More serious negative factors require a heightened showing of favorable evidence, which may even have to involve unusual or outstanding equities.") (citations omitted). We also observe, as we have previously, that rehabilitation is an important factor that will ordinarily be required before section 212(c) relief will be granted. *Vergara-Molina v. INS*, 956 F.2d 682, 685 (7th Cir. 1992) (citing *Matter of Edwards*, Interim Decision 3134 at 8 (available at 1990 BIA LEXIS 8 (BIA May 2, 1990)). Nonetheless, while rehabilitation is an important factor to be considered in the exercise of discretion, *Cordoba-Chaves*, 946 F.2d at 1247 (citing *Matter of Edwards*, Interim Decision 3134 at 8), it is not an absolute prerequisite to section 212(c) relief, *Vergara-Molina*, 956 F.2d at 685, and therefore cannot be the sole factor considered in assessing an alien's application for a waiver of deportation.

Similarly, while an acknowledgment of culpability as to the convictions underlying the deportation proceedings is an important aspect of rehabilitation, it cannot be the exclusive indicator used by the BIA when it determines whether an alien ought to be granted a favorable exercise of discretion under section 212(c). As we have recently observed, "[r]ehabilitation is scarcely a readily determinable fact in the ordinary sense and the Board necessarily makes a judgment call, involving an estimate or prediction of an individual's future conduct." *Palacios-Torres v. INS*, No. 92-2487, slip op. at 7 (7th Cir. May 18, 1993). Here, however, it appears that the BIA relied exclusively on Mr. Guillen's refusal to acknowledge guilt

regarding his convictions. Exclusive reliance on this one factor does not constitute adequate consideration of all of the circumstances surrounding Mr. Guillen's efforts to demonstrate rehabilitation. Accordingly, this matter must be remanded for reconsideration and clarification of the BIA's determination that Mr. Guillen has not been rehabilitated. This determination must be made on the basis of all relevant evidence, not merely his refusal to admit guilt. We emphasize, as we have in prior decisions, that we do not have authority to determine the weight that the BIA should afford to the factors in favor of granting a section 212(c) petition. *See, e.g., Garcia-Lopez v. INS*, 923 F.2d 72, 74 (7th Cir. 1991). Consequently, the BIA may give great weight to acknowledgment of guilt in assessing rehabilitation. However, it may not consider this factor the exclusive relevant factor. We stress that we intimate no opinion as to the result. That issue is entrusted to the Board. We require only that its decision make clear that it considered all evidence of record.

Conclusion

The petition for review is granted and the case is remanded to the BIA for further proceedings consistent with this opinion.

PETITION FOR REVIEW GRANTED;
CASE REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

File: A14 478 717 – Chicago Date: AUG 13 1992

In re: LUIS GUILLEN-GARCIA a.k.a. Romeo Lopez

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Susan Schreiber, Esquire
Travelers & Immigrants Aid of Chicago
327 South LaSalle Street, Room 1400
Chicago, Illinois 60604

ON BEHALF OF SERVICE:
Alexandra Kostich
General Attorney

CHARGE:

Order: Sec. 241(a)(4), I&N Act [8 U.S.C. § 1251(a)(4)] – Convicted of crimes involving moral turpitude

APPLICATION: Waiver of inadmissibility

The Immigration and Naturalization Service (Service) appeals the decision of the immigration judge, dated March 9, 1987, granting the respondent's request for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The respondent has motioned the Board to supplement the record with additional materials. The Service has not opposed the motion, and we will grant it. After review of the record we will sustain the appeal.[1]

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[1] The record contains some documentation concerning the respondent's request for redetermination of his bond. Those documents have formed no part of this decision. *See* 8 C.F.R.

The respondent, a 40-year-old native and citizen of Mexico, entered the United States as an immigrant on or about February 9, 1966. On May 10, 1974, the respondent was convicted of three counts of aggravated battery in violation of Illinois law. The respondent was convicted on two counts of aggravated battery for causing great bodily harm to another individual, and on one count of aggravated battery through the use of a deadly weapon (Exhibit 4). The respondent was sentenced to 5-years' probation for these convictions. On April 18, 1984, the respondent was convicted again, this time for attempted murder (Exhibit 3). The respondent was sentenced to 10-years' confinement, but actually served 4.5 years of his sentence and then was placed on probation for the remainder of his term.

As a result of his convictions, the Service issued the respondent an Order to Show Cause and Notice of Hearing (Form I-221) (Exhibit 1) on July 30, 1984, charging him with deportability under section 241(a)(4) of the Act, 8 U.S.C. § 1254(a)(4) as an alien who has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. At his deportation hearing, the respondent admitted to the truth of the allegations contained in the Order to Show Cause and conceded deportability as charged. The immigration judge found the respondent deportable by clear, convincing, and unequivocal evidence. *See Woodby v. INS*, 385 U.S. 276 (1966); *see also* 8 C.F.R. § 242.14(a) (1992). The respondent

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§ 3.19(d) (1992) (formerly § 3.18(d) but revised and redesignated as § 3.19(d) by 57 Fed. Reg. 11568, 11571-72 (Apr. 6, 1992)).

did not raise any issues regarding his deportability on appeal; therefore, it is not an issue before us.

After finding the respondent deportable, the immigration judge afforded the respondent an opportunity to apply for a waiver of inadmissibility under section 212(c) of the Act. At the close of the hearing, the immigration judge rendered his decision granting the respondent's request for a waiver of inadmissibility. He determined that the respondent's conviction for attempted murder required the respondent to show unusual or outstanding equities before he would grant him relief. The immigration judge then considered the favorable factors of record noting that the respondent had been in this country since 1966, beginning at a young age, that he is married to a United States citizen and had four citizen children, and that his parents are both lawful permanent residents of the United States. The immigration judge concluded that it would be extreme hardship for the respondent's citizen spouse and children to relocate in Mexico. The immigration judge found that the respondent had proved his rehabilitation, even though he claimed to be innocent.[2] He noted that the respondent provided support for his involvement with the church and his employment history.

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[2] The immigration judge stated, "The court, as indicated, cannot go beyond the record and will look at the respondent's convictions for attempted murder as just being that. It appears that nobody has testified contrary to his record and it appears that other than these two convictions, he has not carried any particular weapons and has not been a violent person." Immigration Judge's Decision at 6.

After balancing the favorable factors with the respondent's two convictions, he concluded that given the

> respondent's conditions that with his limited education and his abilities that he has shown outstanding equities although he has been recently released from prison. I determine that the equities of the respondent's austerity, family ties, length of stay and his evidence of rehabilitation are types of consideration, social and humane, which are referred to in the *Matter of Marin*, [16 I&N Dec. 581, 584 (BIA 1978)] and that they outweigh the respondent's undesirable traits, that being his convictions.

Immigration Judge's Decision at 7.

The Service has appealed the decision, asserting that the immigration judge erred in concluding that the respondent had shown his rehabilitation, and that he had wrongly considered favorable factors of record after the issuance of the Order to Show Cause, contrary to *Marti-Xiques v. INS*, 741 F.2d 350 (11th Cir. 1984).[3] Furthermore, the Service contends that the immigration judge improperly considered the respondent's self-serving statements that he committed none of the offenses for which he was ultimately convicted. The Service believes that the respondent did not show outstanding or unusual equities and should not have been granted the waiver in the exercise of discretion. We agree with the Service that the

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[3] *Marti-Xiques v. INS, supra,* does not apply to the present case and we therefore consider all the equities presented by the respondent, including those submitted with his motion.

immigration judge improperly considered the respondent's conviction and that he has not shown that he merits relief in the exercise of discretion.

Section 212(c) of the Act provides, in pertinent part, that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to lawful unrelinquished domicile of 7 consecutive years, may be admitted in the discretion of the Attorney General without regard to certain specified grounds of exclusion. Pursuant to our decision in *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976), a lawful permanent resident is prima facie eligible for relief from deportation under section 212(c), even though he has not proceeded abroad subsequent to the acts which rendered him deportable. *See Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); *see also Matter of Hernandez-Casillas*, Interim Decision 3147 (BIA 1990; A.G. 1991).

Section 212(c) of the Act, however, does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Instead, the Attorney General or his delegate is required to determine as a matter of discretion whether an alien merits the relief sought, and the alien bears the burden of demonstrating that his application warrants favorable consideration. *Matter of Marin, supra*, at 582-83.

The exercise of discretion in a particular case necessarily requires consideration of all the facts and circumstances involved. There must be a balancing of the social and humane considerations presented in an alien's favor against the adverse factors evidencing his undesirability

as a permanent resident. *Id.* at 584. The Board has enunciated numerous factors to be considered in determining whether or not to grant section 212(c) relief. Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character. *Id.* at 584-85. Among the factors deemed adverse to an alien are the nature and underlying circumstances of the exclusion or deportation ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. *Id.* at 584. Moreover, one or more of these adverse considerations may ultimately be determinative of whether section 212(c) relief is in fact granted in an individual case. *Id.*

We also have pointed out that as the negative factors grow more serious, it becomes incumbent upon the alien to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities. *Id.* at 585. Such a heightened showing is required when an alien has been convicted of a serious drug offense. *Id.* at 586 n.4. The necessity of

demonstrating unusual or outstanding equities is not exclusively triggered by serious crimes involving controlled substances, however. Rather, one must examine the gravity of the offense per se. *Matter of Buscemi*, 19 I&N Dec. 628, 633 (BIA 1988); *see also Matter of Marin, supra*. In addition, such a showing may be mandated because of a single serious crime, or because of a succession of criminal acts which together establish a pattern of serious criminal misconduct. *Matter of Buscemi, supra*, at 633-34. We observe that an alien who demonstrates unusual or outstanding equities, as required, does not compel a favorable exercise of discretion; rather, absent such equities, relief will not be granted in the exercise of discretion. *Id.; see also Matter of Marin, supra*. There are cases in which the adverse considerations are so serious that a favorable exercise of discretion is not warranted even in the face of unusual or outstanding equities. Such was the situation in *Matter of Buscemi, supra*.

With respect to the issue of rehabilitation, we have noted in *Matter of Edwards*, Interim Decision 3134 (BIA 1990), that a clear showing of reformation is not an absolute prerequisite to a favorable exercise of discretion in every case involving an alien with a criminal record. Rather, section 212(c) applications involving convicted aliens must be evaluated on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of discretion. *Id.*

Turning to an examination of the respondent's application for a waiver of inadmissibility, we note that his statutory eligibility for that relief has not been contested. In regard to the question whether relief is warranted as a matter of discretion, we note that we review the record

on a de novo basis. The immigration judge's acceptance of the respondent's story surrounding his convictions was an error since both the Board and immigration judges cannot entertain a collateral attack on a judgment of conviction unless that judgment is void on its face. Immigration judges cannot go behind the judicial record to determine the guilt or innocence of the alien. *See Matter of C-*, Interim Decision 3180 (BIA 1992); *Matter of Goldeshtein*, Interim Decision 3158 (BIA 1991); *Matter of Fortis*, 14 I&N Dec. 576, 577 (BIA 1974); *see also Trench v. INS*, 783 F.2d 181 (10th Cir.), *cert. denied*, 479 U.S. 961 (1986); *Avila-Murrieta v. INS*, 762 F.2d 733 (9th Cir. 1985); *Zinnanti v. INS*, 651 F.2d 420 (5th Cir. 1981) (per curiam); *Chiaramonte v. INS*, 626 F.2d 1093 (2d Cir. 1980) (foreign conviction); *Longoria-Castenada v. INS*, 548 F.2d 233 (8th Cir.), *cert. denied*, 434 U.S. 853 (1977); *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988); *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980). Although the immigration judge recognized that he could not go behind the respondent's conviction, his acceptance of the respondent's denial of guilt was tantamount to doing just that. For that reason and because the respondent has offered new evidence with his appeal which we consider, we review the record anew.

We find that the respondent's May 10, 1974, conviction for 3 counts of aggravated battery and his conviction on April 18, 1984, for attempted murder,[4] require him to

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[4] The Service in its brief states that the respondent was "convicted specifically for shooting with a gun, with attempt to murder, without lawful justification, George Arroyo and Ollie

show unusual or outstanding equities to warrant a grant of relief. *See Matter of Buscemi, supra.*

In the respondent's favor, we consider most significant his lengthy period of residence in the United States, beginning in 1966. Not only do we consider his 26-years' residence as significant, but it is given more weight given the fact that the respondent arrived at the young age of 14. Additionally, we find of particular importance that the respondent is married to a United States citizen and has five United States citizen children. The respondent's parents and three siblings are lawful permanent residents of the United States, and four siblings are citizens of this country. While we agree that the respondent's deportation would cause hardships to his family, he has not shown that they would be as extreme as the immigration judge has characterized them.

We also take into consideration the respondent's consistent employment history. The record reflects that the respondent worked at a plastics company from January

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Morgan, while officer Morgan was attempting to arrest him." Service Brief at 5-6. The Service also makes reference to the fact that the respondent caused a permanent disability to the victim of the aggravated batter committed in 1972 in its brief. Service Brief at 5. There is no evidence in the record, except for the materials regarding the respondent's bond redetermination which we do not consider, to support these assertions. The Service asked the respondent if he could tell anything about the victim's "permanent disability" to the victim in 1972. The respondent denied any part in the shooting of the victim. Since there is no evidence of record to support these Service claims, we do not include them in reaching our decision.

1978 to March 1983. After his incarceration, the respondent began work in October 1986 for one month with a lawn maintenance company and then in November 1986 worked for a petroleum company for six months. In February 1987 to the date of his motion, the respondent has worked for a flex-weld company and has also held two part-time jobs in addition to supplement his income.

We find that the respondent's more than 26 years of residence in the United States, beginning at age 14, and his familial circumstances rise to the level of outstanding equities. In addition, we consider the fact that the respondent studied the Bible while in prison and now attends church services. Given the fact that the members of his family are either United States citizens and lawful permanent residents residing in the United States, that he has shown consistent employment history, and that he is residing with and supporting his family, the respondent's equities taken as a whole, rise to the higher standard. Our analysis, however, does not end here. The fact that an alien demonstrates the requisite unusual or outstanding equities does not mandate that discretion be exercised in his favor; rather, we must weigh the equities against the adverse factors. *Matter of Edwards, supra,* at 9.

In regard to the adverse factors in the case, we note the very serious nature of the respondent's convictions for his two offenses. The first conviction, occurring on May 10, 1974, involved three counts of aggravated battery. The respondent pleaded guilty and was convicted on one count of an aggravated battery through the use of a deadly weapon, and on two counts of aggravated battery for causing great bodily harm to another individual. The respondent was sentenced to 5-years' probation for these

offenses. Again, on April 18, 1984, the respondent was convicted of an even more serious offense, attempted murder. As indicated previously, the respondent was sentenced to 10-years' confinement for this offense. All the respondent's criminal violations involved the contemptible use of violence against another, with one conviction involving the attempted taking of the life of another individual. The aggravated battery offenses when added to the attempted murder conviction demonstrate the most reprehensible and deplorable type of conduct.

We also disagree with the immigration judge's conclusion that the respondent "appears to have been rehabilitated." The respondent believes that his continued employment, deep family concerns, and compliance with his probation requirements, show that he has been rehabilitated. We disagree. An initial step in rehabilitation is the acceptance of responsibility for one's criminal conduct. When asked to explain his convictions, the respondent denied committing any of the crimes for which he was convicted. His denial of the commission of his crimes is tantamount to a collateral attack of his convictions. As we have stated earlier, we will not entertain a collateral attack on his convictions. The respondent had been found guilty of aggravated battery and attempted murder, and as such the respondent's attempt to deny his guilt for his crimes shows a failure to accept the responsibility for his convictions. This failure to accept any responsibility reflects a lack of rehabilitation. The respondent's refusal to accept his guilt, notwithstanding the respondent's self-serving statements that he has changed, maintained employment, and cares for his family, shows a lack of rehabilitation on his part.

After evaluating all the factors of record, we find that a grant of relief is not warranted or in the best interests of this country. In reaching this conclusion, we have considered the respondent's outstanding equities and the very serious adverse factors presented in this case, as well as our determination that he has not demonstrated either rehabilitation or other factors to merit a favorable exercise of discretion. While numerous relatives have either testified or submitted affidavits to show that the respondent is a member of a close-knit family and his deportation could cause them hardship, it does not overcome the very serious nature of his convictions, in particular, his attempted murder conviction. While the respondent's deportation may well involve hardship to himself and certainly much unhappiness for his family, the responsibility for this result rests with the respondent alone.

The respondent, through his brief, suggests that his circumstances are more compelling than those in other Board precedents. *See Matter of Wadud,* 19 I&N Dec. 182 (1984); *Matter of Rodriguez-Vera,* 17 I&N Dec. 105 (BIA 1979); *Matter of Salmon,* 16 I&N Dec. 734 (BIA 1978). While the favorable factors might be considered more compelling in the instant case than in some cases in which relief has been granted, the adverse factors are also clearly more egregious. In two cases cited by the respondent, the aliens were not convicted of an aggravated battery or conduct so nefarious as attempted murder. *Cf. Matter of Wadud, supra,* at 183 (Respondent convicted of six counts of conspiracy to defraud and to commit offenses against the United States); *Cf. Matter of Salmon, supra,* at 735 (Respondent convicted of criminal trespass in the third degree, and two robbery offenses in the third

degree). In *Matter of Rodriguez-Vera, supra,* the respondent was convicted of murder, conduct only slightly more egregious than the respondent's conduct in the present case. In that case, however, this Board denied the respondent's motion to reopen, effectively denying the respondent's request for a waiver of inadmissibility under section 212(c) of the Act. Therefore, any analogies to *Matter of Wadud, supra,* or *Matter of Salmon, supra,* fail, given the very serious adverse factors present in the record.

In sum, the immigration judge erred by allowing the respondent to deny his guilt, and in effect successfully collaterally attack his criminal convictions. After our review of the record, the adverse factors reflected by the respondent's convictions for attempted murder and aggravated battery, outweigh the respondent's outstanding equities. We conclude that the respondent has not shown that he merits a waiver of inadmissibility under section 212(c) of the Act. Accordingly, we will sustain the appeal.

ORDER: The appeal is sustained.

FURTHER ORDER: The respondent is ordered deported based on the charge contained in the Order to Show Cause.

/s/ James P Morris
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Chicago, Illinois

File No.: A 14 478 717 March 9, 1987

In the Matter of:	)	IN
	)	DEPORTATION
LUIS GUILLEN-GARCIA	)	PROCEEDINGS
aka:	)	
ROMEO LOPEZ	)	
	)	
Respondent	)	

CHARGE: Section 241(a)(4) of the Immigration and Nationality Act – Conviction of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

APPLICATION: Section 212(c) of the Immigration and Nationality Act – waiver of admissibility.

ON BEHALF
OF RESPONDENT:

Respicio Vazquez, Esquire
Travelers and Immigrants Aid
Attorneys-at-Law
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ON BEHALF
OF SERVICE:

Alexandra Kostich
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ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a thirty-five-year-old married male, a native and citizen of Mexico, who last entered the United States as a lawful permanent resident on or about February 9, 1966. On July 3, 1984, an Order to Show Cause was issued charging the respondent with deportability pursuant to Section 241(a)(4) of the Immigration and Nationality Act (Exhibit 1).

At deportation proceedings the respondent admitted all the allegations of fact and conceded the charge of deportability. Therefore I find that deportability has been established by clear, convincing and unequivocal evidence.

In lieu of deportation, the respondent has applied for 212(c) relief (Exhibit 2A). In regard to 212(c) relief, the Board of Immigration Appeals in the *Matter of Marin*, 2666 (BIA August 4, 1978) has set down certain principles which one must determine in regard to this application. These factors basically are a balancing of adverse factors and favorable factors. The adverse factors have been the nature and underlying circumstances of the exclusion ground at issue, the existence of criminal record and if so it's [sic] nature, recency and seriousness, presence of other evidence indicative of the applicant's bad character or undesirability as a permanent resident of this country. Favorable factors have been found to include family ties within the United States, residence of long duration in this country, evidence of hardship to the applicant and family if deportation occurs, the history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine

rehabilitation if criminal record exists and other evidence attesting to applicant's good character.

In regard to 212(c) relief, the applicant must first show that he has had an unrelinquished domicile of seven consecutive years following a grant of permanent resident status. In regard to this matter, the respondent in this case has proven the seven years. He further has to prove that he has been a lawful permanent resident if this element is proven also. Therefore, in regard to the 212(c) relief requested, the court must base its decision on discretion as indicated in the *Matter of Marin*.

Other factors which must be considered are what weight and proof the respondent must have in regard to this matter concerning discretion and rehabilitation. In the *Matter of Rodriguez* 17 I&N Dec. 105 (BIA 1980), the Board of Immigration Appeals discussed the proof needed in regard to attempted murder charge. I find based upon the conviction in this action on June 25, 1982 for attempted murder that the respondent must demonstrate unusual or outstanding equities in order to be accorded the favorable exercise of discretion in this case.

The evidence shows the respondent entered the United States in 1966 at a very young age, that he is married to a citizen of the United States. This marriage occurred on July 28, 1973 and he has four citizen children, ages twelve, ten, five and eight. The respondent further has parents who are lawful permanent residents, four siblings who are citizens and and [sic] three siblings who are lawful permanent residents.

The negative factors in this action are the two convictions of the respondent. The record shows in Exhibit 4

that on or about November 26, 1972, the respondent did commit the act of aggrevated battery. The respondent was thereafter convicted on May 10, 1974 of three counts of conviction for aggrevated battery wherein he received five years probation on each of the counts. The respondent explained in regard to this conviction that he was at a party with some dates and an altercation occurred wherein individuals came into the dance and tried to take the dates away from the respondent and his friends. Shots were fired and an individual put a gun in his hand and thereafter he was found guilty of aggrevated battery and received probation.

The respondent testified that he's never owned a gun and never used a weapon. The second conviction, the attempted murder, the respondent pled not guilty to the case. The case was tried it appears before a jury and the respondent was convicted of attempted murder and sentenced to serve a term of ten years. The respondent in regard to this accusation or charge stated that he is not guilty, that he was exiting his vehicle to ask individuals to move aside so he could move on with his vehicle, shots were fired at him, he was hit and thereafter was placed in a hospital and found out that he was charged with attempted murder.

While the respondent was incarcerated for approximately four and a half years for this conviction, he has indicated he had filed an appeal in this matter but his counsel, although ordered by the court, advised the court that he could not find any appeal. While incarcerated the respondent completed two technical courses concerning

welding. While incarcerated, the respondent's family, siblings, visited him while he was incarcerated. The respondent left incarceration in 1986 and became employed with C.E. Smith in lawn maintenance and now is presently employed for Parent Petroleum. Respondent has testified to his innocence. The court cannot go beyond the convictions in this matter but can take into consideration the respondent's story.

The respondent's wife has testified that it would be an extreme hardship for her and to her children to have the respondent relocate to Mexico. She testified that the children and herself were in Puerto Rico for approximately a year. At that time the children could not adapt to Puerto Rico, could not adapt to the schools. She further testified that the respondent is a good husband, good provider and that it would be a hardship to her and her children for the respondent to leave because he provides the necesary [sic] monies for expenses although she does work and also provides companionship for herself and her children. And the separation from the husband would be an additional hardship to the wife and children.

Two of the children testified to the hardship they would incur if the respondent would have to depart They've indicated that they had a hard time in Puerto Rico going to the schools as the Spanish Language was taught and they were not familiar with the Spanish Language. They further indicated that they have had a lot of activities with their father and that their father has only been to work and thereafter been with the family.

Numerous relatives including parents and siblings have testified or have submitted affidavits to the effect

that they have a close knit family, that the respondent stays somewhat at home or is with his family or at family gatherings. Respondent has testified further to his innocence and to his rehabilitation in regard to future plans.

In regard to extreme hardship, I find it would be an extreme hardship for respondent's citizen wife and four citizen children for the respondent to relocate to Mexico. First it appears that there would be a definite separation and the wife would not bring herself and her children to Mexico with the respondent based upon the previous incident of one year in Puerto Rico. Furthermore it appears that the respondent is a mainstay to the family although he has been away for four and a half years. He has provided stability to the family, providing an income and wages for the family and also providing companionship and fatherhood to his children and husbandry to his wife. It appears that the respondent since being released from prison has somewhat stayed at home taking care of his children and has been able to also go to church with his family.

The respondent further has proven that he has rehabilitated himself although he admits his innocence in this matter and pled guilty. The court, as indicated, cannot go beyond the record and will look at the respondent's convictions for attempted murder as just being that. It appears that nobody has testified contrary to his record and it appears that other than these two convictions, he has not carried any particular weapons and has not been a violent person. The parole officer submitted a letter indicating that he's under minimum supervision. It further appears that we have letters from churches and his employers concerning his good working habits.

Additionally, we must look at the respondent having been in the United States since 1966 and not having any particular relatives in Mexico. I, therefore, find that the respondent's positive factors outweigh the negative factors in this matter. Respondent's demeanor has been very sincere. He has exceptional family ties and he's been in the United States since 1966 and appears to have been rehabilitated. The evidence leads me to conclude the respondent can become a productive member of our society and should be allowed to remain in this country. The respondent, although only working and trying to be with his family, an individual like himself cannot always reach the outstanding equities involved in regard to commission of a crime such as attempted murder, after having been convicted of three other crimes for aggrevated battery. But I find in regard to respondent's conditions that with his limited education and his abilities that he has shown outstanding equities although he has been recently released from prison. I determine that the equities of the respondent's austerity, family ties, length of stay and his evidence of rehabilitation are types of consideration, social and humane, which are referred to in the *Matter of Marin*, at p. 584 and that they outweigh the respondent's undesirable traits, that being his convictions. Accordingly, the following order shall be entered:

ORDER

IT IS ORDERED that the application for a waiver of deportability under Section 212(c) is granted and these actions are terminated.

/s/ Dennis R. Kramer
DENNIS R. KRAMER
Immigration Judge

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

August 16, 1995.

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

LUIS GUILLEN-GARCIA, Petitioner, No. 94-2559 v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	Petition for Review of an Order of the Board of Immigration Appeals No. A14-478-717

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by the petitioner on July 31, 1995, no judge in active service has requested a vote thereon, and the judges on the original panel have voted to deny the petition.

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.